

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2070
77-2100

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2070

RODERICK S. DUBOIS,
Appellant,

-VS-

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,
Appellee.

DOCKET NO. 77-2100

ALAN GENE KINCAIDE and
MELVIN E. HENTOFF,
Appellants,

-VS-

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANTS

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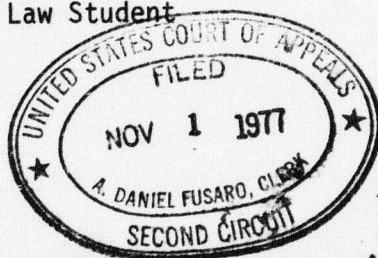


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PRELIMINARY STATEMENT

These two cases, consolidated for appeal, present the issue of whether guidelines promulgated by the United States Parole Commission violate the sentencing provisions set forth by Congress at 18 U.S.C. §4205. Appellants Roderick S. DuBois and Alan G. Kincaide were sentenced pursuant to 18 U.S.C. §4205(b)(2) and §4208(a)(2) respectively * and were both denied parole by the Parole Commission. In each case, the Commission based its decision exclusively upon its guidelines. Appellants contend that the failure of the Commission's guidelines to recognize and weigh explicitly Appellants' institutional adjustment and performance violates Congress' statutory scheme, which provides alternative sentencing options to judges.

Appellant DuBois filed, pro se, a petition for a writ of habeas corpus which was denied on May 19, 1977 by the Honorable Jon O. Newman, who did not order the respondent to file an answer. Appellant Alan G. Kincaide filed, pro se, a petition for a writ of habeas corpus which was denied on July 14, 1977 by the Honorable Robert Zampano.

* 18 U.S.C. §4205(b)(2) is a verbatim reenactment of 18 U.S.C. §4208(a)(2). Both provide, in pertinent part, that..."the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such times as the Commission may determine..." The 18 U.S.C. §4205(b)(2) sentence is often referred to as a "(b)(2)" sentence.

STATEMENT OF FACTS

A. Roderick S. DuBois

Appellant Roderick S. DuBois was convicted of bank robbery (in violation of 18 U.S.C. §2113) and of unlawful disposition of stolen goods (in violation of 18 U.S.C. §2315). On June , 1976, he was sentenced to a four year term of imprisonment, imposed by the Honorable Edward T. Gignoux of the United States District Court for the District of Maine. Appellant DuBois was sentenced pursuant to 18 U.S.C. §4205(b)(2). Appellant DuBois began serving his federal sentence on June 14, 1976.

Appellant DuBois received his initial parole hearing before two Parole Commission hearing examiners of the United States Parole Commission on August 24, 1976. These examiners, relying on the Parole Commission guidelines effective May 14, 1976, codified at 28 C.F.R. §2.20 (1976), evaluated Appellant DuBois' parole prognosis.*

The guidelines consist of a matrix listing on its vertical axis six categories of "severity of offense behavior" ranging from "low" to "greatest". The severity of an offense is categorized according to the Commission's view of the nature of a crime; an inmate's placement into a category is based on a description of the

* Since 1976, the guidelines have been modified in some minor ways, none of which affect Appellants' claim, because Appellants' cases continue to be governed by the guidelines used at the initial hearing. See 42 Fed. Reg. 39813 (August 5, 1977). For the Court's information, a copy of the modified guidelines have been attached as Exhibit A to Appellants' brief.

crime for which he or she has been charged or convicted. Thus, an inmate's offense severity remains unchanged during the period of incarceration.

In evaluating Appellant DuBois' "offense severity", the hearing examiners decided that the activities for which Appellant DuBois was convicted were best described as "robbery". The examiners then went to the chart of crimes prepared by the Parole Commission, found the crime robbery as being in the "very high" severity category, and rated Appellant DuBois accordingly.

The horizontal axis of the guideline matrix consists of four categories of "offender characteristics" called the "parole prognosis" or "salient factor score." The prognoses possible range from "very good" to "poor." Placement in a prognosis category depends on the number of points received in the salient factor score. At the time of Appellant DuBois' hearing, an inmate could score a maximum of eleven points on nine "items" in the salient factor score.

For "Item A" of the salient factor score, an inmate was rated according to the number of prior convictions; if the inmate had no prior convictions, he or she could have received two points, one or two prior convictions resulted in a score of one point, and three or more prior convictions yielded no points. Appellant DuBois received no points for "Item A". "Item B" looked at prior

incarcerations. No prior adult or juvenile incarcerations gave an inmate two points; one or two prior incarcerations yielded one point, and three or more prior convictions resulted in no points. Appellant DuBois received one point for "Item B". The score for "Item C" was based upon the age of the inmate when first committed to a prison. If the inmate was 18 years or older, one point was given; if not, he or she received no points. Appellant DuBois received one point. "Item D" questioned whether the offense for which the inmate was serving involved auto theft. If it did not, the inmate received one point. Appellant DuBois received one point for this item. "Item E" was scored according to whether the inmate had had parole revoked or had been committed for a new offense while on parole. If the answer was "no", then the inmate received one point. Appellant DuBois received one point.

For "Item F", if an inmate had no history of heroin or opiate dependence, he received one point; where past drug dependence was shown, the inmate received no points. Appellant DuBois received one point for this item. For "Item G", the Commission asked whether the inmate had completed the twelfth grade or received an equivalent degree. Where the inmate had these educational qualifications, one point was given. Appellant DuBois received no points for this item. For "Item H", the Commission inquired into whether the inmate had had verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community. Where

the answer was "yes", the inmate received one point. Appellant DuBois received no points for "Item H". "Item I" addressed the inmate's release plans; where the inmate intended to live with spouse and/or children, he or she received one point; if not, the inmate received no points. Appellant DuBois received one point for this item.

Appellant DuBois' salient factor score totalled 6 out of the eleven points possible. He was therefore grouped into the 8-6 point "good" parole prognosis category.

As is evident from the foregoing list, all of the questions on the salient factor score--with the possible exception of "release plan to live with spouse and/or children"--were retrospective in nature. Thus, the salient factor score did not reflect any data about an inmate's institutional adjustment or progress made towards rehabilitation since incarceration.

Having evaluated the offense severity and salient factor scores of Appellant DuBois, and using these two indices alone, the hearing examiners applied their grid to determine the intersection point for a person with a "salient factor score" of 6 and "very high" offense severity rating. The intersection point indicated a guideline range from 36 to 45 months to be served before release. Therefore, applying the guidelines, the hearing examiners denied Appellant DuBois parole and continued him for another review at the one third point of his sentence as required by 28 C.F.R. §2.14(e)(1976).

When Appellant DuBois received his "Notice of Action" from the Parole Commission, the following statement of reasons was given:

CONTINUE FOR HEARING AT ONE THIRD OF SENTENCE.

REASON: Your offense severity behavior has been rated as very high severity because you participated in the burglary of a bank and jewelry store by helping to dispose of the proceeds from the burglaries as noted in the hearing. You have a salient factor score of 6. You have been in custody a total of 5 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. Commission policy prohibits a continuance past one-third of your sentence at initial hearing. Therefore, your case has been scheduled for further consideration at one-third of your sentence. (Emphasis added). Supplemental App. Exhibit A.*

Appellant DuBois filed an appeal to the Regional Director of the Parole Commission; the Regional Director's response was:

Affirmation of the previous decision (a) No other information submitted for requested review was deemed significant enough to affect the decision (b) Reasons given support the order. See Supplemental App. Exhibit B.

* Because Appellant DuBois' petition was dismissed before he was represented by counsel and because the government was not ordered to respond, the record in the District Court did not contain Appellant DuBois' "Notice of Action" and the "Notice of Action on Appeal" from the Parole Commission Regional Directors or from the National Appeals Board.

Similarly, the petition filed by Appellant Alan Gene Kincaide omitted his "Notice of Action on Appeal" from the United States Parole Commission National Appeal Board. However, by stipulation of the parties, the appendix has been expanded for the limited purposes of amplification and clarification of the proceedings below and therefore these notices have been included. See the Supplemental Appendix.

Appellant DuBois then filed an appeal to the United States Parole Commission National Appeals Board whose reply was also an "Affirmation of the previous decision. Reasons given support the decision." Supplemental Appendix, Exhibit C. Having filed these two appeals, Appellant DuBois had exhausted all administrative remedies available to him.

On April 22, 1977 Appellant DuBois, pro se, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2241, in the District Court for the District of Connecticut. Without ordering respondents to answer and without counsel being appointed to the case, the Honorable Jon O. Newman dismissed the petition.

Appellant DuBois, still proceeding pro se, filed a "Notice of Appeal" from the judgment on May 19, 1977; counsel entered their appearance on August 25, 1977.

B. Alan Gene Kincaide

Appellant Alan Gene Kincaide was convicted of multiple counts of forgery and uttering in violation of 18 U.S.C. §495.

On April 19, 1976 Appellant Kincaide was sentenced, pursuant to 18 U.S.C. §4208(a)(2), to a five year term of imprisonment by the Honorable Daniel Snyder Jr. of the United States District Court for the Western District of Pennsylvania. He began serving his sentence on May 13, 1976.

Appellant Kincaide received his initial parole hearing on August 24, 1976. The hearing examiners used the same guidelines as had been used for Appellant DuBois. See 28 C.F.R. §2.20 (1976), and thus they relied upon the same criteria enumerated above which did not include institutional progress or rehabilitation.

The examiners rated Appellant Kincaide's conviction for forgery and utterance as one of "low-moderate" offense severity. Appellant Kincaide received a "salient factor score" of 3. Therefore, he was placed in the "poor" parole prognosis category. Placing these two labels on their grid, the hearing examiners determined a guideline range of from 20 to 25 months to be served by Appellant Kincaide before release. Therefore, the examiners denied Appellant Kincaide parole and continued him for a next review at the one third point of his sentence. See 28 C.F.R. §2.14(e)(1976).

When Appellant Kincaide received his "Notice of Action" from the Parole Commission, the following statement of reasons was given:

CONTINUE FOR HEARING AT ONE-THIRD OF SENTENCE.
REASON: Your offense behavior has been rated as low moderate severity. You have a salient factor score of 3. You have been in custody a total of 4 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 20-25 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision above the guidelines at this consideration appears warranted because your history of criminal deviance and parole violations as noted in pre-sentence report dated 10-7-74 indicate you will not remain at liberty without further violation of the law. Commission policy prohibits a continuance past one-third of your sentence at initial hearings. Therefore, your case has been scheduled for further consideration at one-third of your sentence.

Appellant Kincaide sought administrative review of the decision; he appealed to the Regional Director who affirmed the decision below saying:

Affirmation of the previous decision. (a) No other information submitted for requested review was deemed significant to affect the decision.
(b) Reasons given support the order.

Appellant Kincaide then appealed to the United States Parole Commission National Appeals Board whose reply was "Affirmation of the previous decision. Reasons given support the decision." See Supplemental Appendix, Exhibit D.

On October 23, 1976, Appellant Kincaide filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2241. The petition was joined with that of Melvin C. Hentoff who, when he had finally served the time required by the guidelines, was released on parole. On March 11, 1977, Appellant Kincaide was transferred from the Federal Correctional Institution at Danbury, Connecticut to the Federal Correctional Institution at Allenwood, Pennsylvania. On April 5, 1977, Yale Legal Services was appointed as attorneys for Appellant Kincaide. The petition was denied on the merits by the Honorable Robert C. Zampano on July 14, 1977.

Appellant Kincaide filed a Notice of Appeal on July 28, 1977.

ARGUMENT

I. 18 U.S.C. §4205 CREATES ALTERNATIVE SENTENCING PROCEDURES FOR JUDGES.

Under 18 U.S.C. §4205, a federal judge who is imposing a sentence of imprisonment exceeding one year has three alternative ways in which to instruct the Parole Commission on when a prisoner may be eligible for parole. Section (a)* provides:

* 18 U.S.C. §4205(a) is a recodification and reenactment of 18 U.S.C. §4202 (under which an inmate was eligible for parole only after serving one-third of a sentence or fifteen years of a sentence over forty-five years). 18 U.S.C. §4202 was the only sentencing procedure available until 1958. In 1958, 18 U.S.C. §4208 was enacted to provide an alternative to §4202. 18 U.S.C. §4205 is the 1976 recodification which combines the provisions of the earlier 18 U.S.C. §4202 and 18 U.S.C. §4208.

[w]henever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence of over thirty years, except to the extent provided by law.

Section (b) permits a court to: (1) designate in the sentence imposed, a maximum term at the expiration of which the prisoner shall become eligible for parole, which term may not be less than but shall not be more than one-third of the maximum sentence imposed by the court or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

Thus, under this scheme, the §4205(a) or "regular" adult sentence precludes parole consideration prior to one-third of the inmate's sentence, the "(b)(1)" sentence permits the timing of parole eligibility to be determined by the sentencing judge, and the "(b)(2)" sentence permits parole eligibility at any point of incarceration as determined by the Parole Commission.

Appellant DuBois was sentenced under 18 U.S.C. §4205(b)(2). Appellant Kincaide was sentenced under the identical provisor : in the earlier 18 U.S.C. §4208(a)(2). Thus, both Appellants did not have to serve a minimum period of time before parole eligibility; rather they became eligible for parole as early in their incarceration as the Commission designated.

In U.S. v. Oates, slip op. 6389 (2d Cir. June 3, 1977), this Court described the role of the judiciary in interpreting statutes. It said, "[o]ur function as an interpretive body is, of course, to construe legislative enactments in such a way that the intent of the legislative body is carried out." Oates, supra, at 6447. Here, as in Oates, the Court must look at a statutory scheme and interpret its meaning. And to do so, the Court must consider both the language of the statute and the legislative history which illuminates Congress' choice of words.

In offering the sentencing judge three options, Congress permitted the judge to choose what he or she deems to be the best option for each convicted person. That the legislature intended to provide distinct alternatives to judges can be seen by the language and structure of the statute, which provides three alternative sentencing methods. Legislative history of the sentencing provision further explains Congress' intent. When the author of the bill, Congressman Emmanuel Celler, discussed his proposal of 18 U.S.C. §4208 as an alternative sentencing procedure to the only other sentence then available, 18 U.S.C. §4202, he detailed the reason for allowing the judge this option:

The present statute, which is section 4202 of title 18 of the United States Code, provides that a prisoner may not be eligible for parole until he has served one-third of the sentence imposed. This is a purely arbitrary limitation and does not take into

consideration the varying responses which individual prisoners make to the rehabilitation program carried on in our Federal penal and correctional institutions. It frequently happens that a prisoner is ready for release before the statutory minimum of eligibility is reached. The sentencing judge has the benefit of the presentence report, is familiar with local conditions, and any aggravation or mitigation circumstances involved. In cases where he believes the defendant might respond quickly to the rehabilitation program, the proposed bill would give the judge the authority to fix an earlier eligibility date for release.

Hearing on H.J. Res. 424, H.J. Res. 425 and J.R. 8923 before subcommittee No. 3, House Committee on the Judiciary, 85th Congress, 2d Sess., Ser. 14 at 5 (1958).

The fact that the opportunity to assess the rehabilitation progress of an inmate was central to the §4208(a)(2) sentence was reaffirmed by testimony of the then Deputy Attorney General Lawrence E. Walsh, who said:

The purpose of this bill is to permit a judge to impose on...[the convicted felon] a sentence with a broad enough range between the minimum and the maximum so that the people who work with him from day to day in the prison can see his progress and pick that very moment when he is best suited to go back to the community and take an active part.

Hearings, supra, at 8.

Thus §4208(a)(2) was designed to give judges the opportunity of imposing an indeterminate sentence which would allow early parole consideration. Moreover, the reason for providing early parole consideration was to permit the Commission to see an inmate's institutional performance and rehabilitative progress--that is, the information which was unavailable to the judge at the time of sentencing

but which becomes available to parole hearing examiners by way of the reports submitted by correctional officers, who make "day-to-day observation[s] of the prisoner as he serves his term." Hearings, supra, at 18.

It is not legislative history alone which supports this interpretation of §4208(a)(2). Courts too have recognized that the major purpose of Congress' passage of §4208(a)(2) was to encourage inmates' rehabilitation efforts by allowing for serious parole consideration prior to the one-third point of their sentence.

In Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975), this Court, citing Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974), said of §4208:

[a] major purpose of any indeterminate sentencing provision is to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community. By keeping the minimum low, the prisoner is encouraged 'to earn favorable consideration for parole in accord with the public policy embodied in the parole statutes.'

520 F.2d. at 32.

Garafola v. Benson, supra, goes further to state:

[i]t is apparent from the terms of the statutes governing the sentencing of adult offenders, §4202 as well as §4208, that at least one major purpose of §4208(a)(2) is to provide the sentencing judge with the option of allowing the Parole Board to release the prisoner on parole at any time before the one-third point if in its judgment events after the date of sentencing warrant early release.

505 F.2d. at 1216 (emphasis added).

The statutory purpose of §4205(a)(2) is implemented by the sentencing judge who, at the time of sentencing, has knowledge of a convicted felon's background, which is summarized in the pre-sentence report. With this information, a judge makes a decision as to an appropriate sentence. By choosing a (b)(2) sentence over the other alternatives, the judge consciously decides to permit an inmate to become eligible for parole before serving a minimum time period.

Thus, when someone serving a (b)(2) sentence is before the Parole Commission, the one additional piece of information available to the Commission which was not available to the sentencing judge is what has happened to that individual while incarcerated. This rehabilitative progress is what a sentencing judge wants the Parole Commission to use as an indicator of parole eligibility. Thus, to ignore the (b)(2) designation, to fail to distinguish it from other sentences, and to fail to treat a (b)(2) inmate differently from one sentenced under (b)(1) or under §4205(a) is to violate the statutory scheme crafted by Congress.

II. THE PAROLE COMMISSION'S PRESENT GUIDELINES VIOLATE §4205(b)(2) BECAUSE THEY FAIL TO MEASURE REHABILITATION.

The Parole Commission relies very heavily upon its guidelines when making parole release decisions.* Between October, 1973,

* In fact, if the hearing examiners make a decision outside the guidelines, specific reasons to support that choice must be given. See Report, The United States Parole Commission (1977) at 11 and 28, C.F.R. §2.13(d)(3), 42 Fed. Reg. 39812 (August 5, 1977).

and March, 1974, 91.7% of all decisions at initial parole hearings were within the guidelines. Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 825 n. 75 (1975) (hereinafter Parole Release Decisionmaking). More recent data continues to confirm heavy reliance upon the guidelines. From April 1976 until September 1976, 80.8% of all parole decisions were within the guidelines. See Report, The United States Parole Commission (1977) at 23. And, of course, the guidelines were relied upon in determining whether or not to release Appellants.

As described above, supra, at pp. 2-5, the guidelines consist of two factors upon which inmates are scored. The "offense severity" rating is based on the Commission's classification of a criminal conviction and is not subject to change during the inmate's incarceration. The second factor, the "salient factor" score, is based upon a number of characteristics thought to be good indicators that the inmate will succeed on parole. All of the characteristics which form an inmate's salient factor score are derived from the inmate's behavior prior to incarceration and, like the offense severity rating, do not change during an inmate's incarceration.

The Guideline Table thus represents two major departures in previous parole release decisionmaking. It establishes explicit criteria which, in most cases, determine the parole release eligibility date. And in its choice of criteria, it abandons any attempt to condition release upon any rehabilitative factors.

Parole Release Decisionmaking, supra, 84 Yale L.J. at 826.

Although the regulations promulgated to govern parole decisionmaking list a number of factors besides the guidelines which might be considered, including various indicators of institutional performance and rehabilitation, such factors are not given weight in making the decision as to parole eligibility. As is stated in each of the Appellants' "Notice of Action", rehabilitation was not a factor in their parole decision because each decision under the guidelines is predicated upon the inmates' "good institutional program performance and adjustment". As stated by the Commission, "[t]he time ranges specified by the guidelines are established for cases with good institutional performance." Report, The United States Parole Commission (1977) at 10.

The minimal consideration given to rehabilitative progress under the Commission's present system of decision-making is inconsistent with the emphasis on rehabilitative progress that is evidently the purpose of §4205(b)(2). The very reason for providing judges with the sentencing option of early parole eligibility is undermined by the Commission's overwhelming reliance upon a set of guidelines which contain no indicators of institutional performance or rehabilitation. Under the present system, inmates have little incentive to work at rehabilitation during incarceration. They know that there is little likelihood of avoiding serving the minimum term specified not by the sentencing judge but by the parole guidelines.*

*The guidelines often result in setting minimum times to be served which are in excess of the sentence imposed by the sentencing judge. For example, an individual, represented by Attorneys for Appellant, was convicted of a conspiracy to sell cocaine and was given a twenty month sentence; under the guidelines his criminal behavior was rated as "very high", his parole prognosis as "good" and his guideline time as from 36 to 45 months to be served before he was eligible for parole.

As stated earlier, Congress intended that institutional performance be a major factor in parole consideration under §4205(b)(2). In other words, Congress intended that parole consideration for (b)(2) prisoners be more than simply a reconsideration of the information available to judges at the time of sentencing. Yet the guidelines simply reiterate all that was known to the sentencing judge and do not even look to institutional adjustment and rehabilitative progress, the only factors not known to the sentencing judge. Thus, rehabilitation is only considered after guidelines are used and guidelines are determinative.*

CONCLUSION

The United States Parole Commission did not consider the progress made by Appellants towards rehabilitation when it denied them parole. Instead, it relied exclusively upon guidelines which fail to explicitly weigh and factor into the parole decision an inmate's rehabilitative progress and thus which violate the intent of the judges who chose to sentence Appellants pursuant to the (b)(2) option.

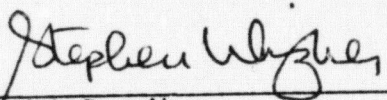
* This court has repeatedly required that the reasons for parole denial be given in explicit terms. See Coralluzzo v. New York State Parole Board, slip op. 5067 (2d Cir. July 28, 1977) and United States ex rel. Johnson v. New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1974). Thus, if the Commission were to attempt to argue that the rehabilitative efforts of Appellants had been considered, it is odd that the Commission has failed to mention rehabilitation in any of its communications with Appellants.

In applying the guidelines to Appellants, without considering rehabilitation, the Commission has made the (b)(2) sentence meaningless. Appellants' prospects for parole, as judged by their guidelines, is the same at the time of sentencing, three months after their commitment, and at the one-third point of their sentence. The application of the guidelines in these cases thus violates the Congressional statutory scheme, its intent, and the expectations of the sentencing judges, for it resulted in a parole consideration which did not meaningfully consider rehabilitation. Therefore, Appellants, who were all sentenced under 18 U.S.C. §4205(b)(2) and its predecessor, 18 U.S.C. §4208(a)(2), are entitled to immediate release or, in the alternative, to a parole hearing in which the Commission must consider their institutional adjustment and rehabilitative progress.

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to the Office of the United States Attorney, 270 Orange Street, New Haven, Connecticut, 06510, this 14th day of October, 1977.

Stephen Wilgus

Date OCTOBER 14, 1977

designation, may be removed from original jurisdiction under the procedures specified in paragraph (a) of this section following a regularly scheduled hearing or the reopening of the case pursuant to § 2.28. Removal from original jurisdiction may also occur by majority vote of the Commission considering an appeal pursuant to § 2.27. Where the circumstances warrant, a case may be redesignated as original jurisdiction pursuant to the provisions of paragraphs (a) and (b) of this section.

§ 2.18 Granting of parole.

The granting of parole to an eligible prisoner rests in the discretion of the United States Parole Commission. As prerequisites to a grant of parole, the Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined; and upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, must determine that release would not depreciate the seriousness of his offense or promote disrespect for the law, and that release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).

§ 2.19 Information considered.

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Presentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration,

the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity

level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.31.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

Guidelines for decisionmaking

[Customary total time to be served before release (including jail time)]

(in months)

Offense characteristics (examples)	Offender characteristics—parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Adult				
Low:				
Escape (open institution or program (e.g., CTC, work release)—absent less than 7 d.				
Marihuana or soft drugs, simple possession (small quantity for own use).	6-10	8-12	10-14	12-18
Property offenses (theft or simple possession of stolen property) less than \$1,000.				
Low moderate:				
Alcohol law violations.				
Counterfeit currency (passing/possession less than \$1,000).				
Immigration law violations.				
Income tax evasion (less than \$10,000).	8-12	12-16	16-20	20-28
Property offenses (forgery/fraud/theft from mail/embellishment/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.				
Selective Service Act violations.				
Moderate:				
Bribery of a public official (offering or accepting).				
Counterfeit currency (passing/possession \$1,000 to \$10,000).				
Drugs:				
Marihuana, possession with intent to distribute/sale (small scale (e.g., less than 50 lb)).				
"Soft drugs", possession with intent to distribute/sale (less than \$500).				
Escape (secure program or institution, or absent 7 d or more—no fear or threat used).	12-16	16-20	20-24	24-32
Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun).				
Income tax evasion (\$10,000 to \$50,000).				
Mailing threatening communication(s).				
Misprison of felony.				
Property offenses (theft/forgery/fraud/embellishment/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$10,000.				
Smuggling/transporting of alien(s).				
Theft of motor vehicle (not multiple theft or for resale).				
High:				
Counterfeit currency (passing/possession \$20,000 to \$100,000).				
Counterfeiting (manufacturing).				
Drugs:				
Marihuana, possession with intent to distribute/sale (medium scale (e.g., 50 to 1,000 lb)).				
"Soft drugs", possession with intent to distribute/sale (\$500 to \$5,000).	16-20	20-26	26-34	34-44
Explosives, possession/transportation.				
Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons).				
Mann Act (no force—commercial purposes).				
Theft of motor vehicle for resale.				
Property offenses (theft/forgery/fraud/embellishment/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.				

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—marginal prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Very high:				
Robbery (weapon or threat)				
Breaking and entering (bank or post office entry or attempted entry to vault)				
Drugs:				
Marihuana, possession with intent to distribute/sale (large scale (e.g., 2,000 lb or more)).				
"Soft drugs", possession with intent to distribute/sale (over \$5,000).				
"Hard drugs", possession with intent to distribute/sale (not exceeding \$100,000).	20-36	30-48	48-60	60-72
Extortion				
Mann Act (force)				
Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.				
Sexual act (force)				
Greatest:				
Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury.				
Aircraft hijacking				
Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of \$100,000).				
Espionage				
Explosives (detonation)				
Kidnaping				
Willful homicide				

Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variation in severity possible within the category.

YOUTH/NARA

Low:				
Escape (open institution or program (e.g., CTC, work release)—absent less than 7 d).				
Marihuana or soft drugs, simple possession (small quantity for own use).	6-10	8-12	10-14	12-18
Property offenses (theft or simple possession of stolen property) less than \$1,000.				
Low moderate:				
Alcohol law violations				
Counterfeit currency (passing/possession less than \$1,000).				
Immigration law violations				
Income tax evasion (less than \$10,000).	8-12	12-16	16-20	20-28
Property offenses (forgery/fraud/theft from mail/embellishment/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$1,000.				
Selective Service Act violations				
Moderate:				
Bribery of a public official (offering or accepting)				
Counterfeit currency (passing/possession \$1,000 to \$19,999).				
Drugs:				
Marihuana, possession with intent to distribute/sale (small scale (e.g., less than 50 lb)).				
"Soft drugs", possession with intent to distribute/sale (less than \$500).				
Escape (secure program or institution, or absent 7 d or more—no fear or threat used).				
Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun).	9-12	12-17	17-21	21-28
Income tax evasion (\$10,000 to \$50,000).				
Mailing threatening communication(s)				
Misprison of felony				
Property offenses (theft/forgery/fraud/embellishment/interstate transportation of stolen or forged securities/receiving stolen property) \$1,000 to \$19,999.				
Smuggling/transporting of alien(s)				
Theft of motor vehicle (not multiple theft or for resale)				
High:				
Counterfeit currency (passing/possession \$20,000 to 100,000).				
Counterfeiting (manufacturing)				
Drugs:				
Marihuana, possession with intent to distribute/sale (medium scale (e.g., 50 to 1,999 lbs)).				
"Soft drugs", possession with intent to distribute/sale (\$500 to \$5,000).	12-16	16-20	20-28	28-32
Explosives, possession/transportation				
Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons).				
Mann Act (no force—commercial purposes)				
Theft of motor vehicle for resale				
Property offenses (theft/forgery/fraud/embellishment/interstate transportation of stolen or forged securities/receiving stolen property) \$20,000 to \$100,000.				
Very high:				
Robbery (weapon or threat)				
Breaking and entering (bank or post office entry or attempted entry to vault)				
Drugs:				
Marihuana, possession with intent to distribute/sale (large scale (e.g., 2,000 lbs or more)).				
"Soft drugs", possession with intent to distribute/sale (over \$5,000).				
"Hard drugs", possession with intent to distribute/sale (not exceeding \$100,000).	20-27	27-36	36-41	41-48
Extortion				
Mann Act (force)				
Property offenses (theft/forgery/fraud/embellishment/interstate transportation of stolen or forged securities/receiving stolen property) over \$100,000 but not exceeding \$500,000.				
Sexual act (force)				

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Greatest: Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of \$100,000). Espionage. Explosives (detonation). Kidnapping. Willful homicide.	Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variation in severity possible within the category.			

NOTES.—1. These guidelines are predicated upon good institutional conduct and program performance.
 2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
 3. If an offense behavior can be classified under more than 1 category, the most serious applicable category is to be used.
 4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
 5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
 6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, L&D, and hashish.
 7. Conspiracy shall be rated for guideline purpose according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.

SALIENT FACTOR SCORE

Case name.....	Register No.....	☐
Item A.....		☐
No prior convictions (adult or juvenile)=1.		
1 prior conviction=2.		
2 or 3 prior convictions=1.		
4 or more prior convictions=0.		
Item B.....		☐
No prior incarcerations (adult or juvenile)=1.		
1 or 2 prior incarcerations=1.		
3 or more prior incarcerations=0.		
Item C.....		☐
Age at first commitment (adult or juvenile):		
26 or older=2.		
18 to 25=1.		
17 or younger=0.		
Item D.....		☐
Commitment offense did not involve auto theft or check (s) (forgery/falsery)=1.		
Commitment offense involved auto theft or check (s)=0.		
Item E.....		☐
Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time=1.		
Has had parole revoked or been committed for a new offense while on parole, or is a probation violator this time=0.		
Item F.....		☐
No history of heroin or opiate dependence=1.		
Otherwise=0.		
Item G.....		☐
Verified employment (or full-time school attendance) for a total of at least 6 mo during the last 2 yr in the community=1.		
Otherwise=0.		
Total score.....		☐

§ 2.21 Reparole consideration guidelines.

(a) If revocation is based upon administrative violation(s) only [i.e., violations other than new criminal conduct] the following guidelines shall apply.

Positive supervision history (examples):

- a. No serious alcohol/drug abuse and no possession of weapon(s) [and]
- b. At least 8 months from date of release to date of violation behavior [and]
- c. Positive employment/school record during supervision [and]
- d. Present violation represents first instance of failure to comply with parole regulations of this term.....

Customary time to be served before rerelease (months)

0-8

Negative supervision history (examples):

- a. Serious alcohol/drug abuse (e.g., readmission to hard drugs) or possession of weapon(s) [or]
- b. Less than 8 months from date of release to date of violation behavior [or]
- c. Negative employment/school record during supervision [or]
- d. Negative attitude toward supervision demonstrated by lack of positive efforts to cooperate with parole (aftercare) plan or by repetitious or persistent violations.....

8-16

(b) (1) If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct, the appropriate severity rating for the new criminal behavior shall be calculated. New criminal conduct may be determined either by a new federal, state, or a local conviction or by an independent finding

by the Commission at revocation hearing. As violations may be for state or local offenses, the appropriate severity level may be determined by analogy with listed federal offense behaviors.

(2) The guidelines for parole consideration specified at 28 CFR 2.20 for the poor parole risk category shall then be applied. The original sentence type (i.e., adult, youth), shall determine the applicable guidelines for the parole violator term. Time served on a new state or federal sentence shall be counted as time in custody. This does not affect the computation of the total violator term as provided by §§ 2.47 (b) and (c) and 2.52 (c) and (d).

(c) The above are merely guidelines. A decision outside these guidelines (either above or below) may be made when circumstances warrant. For example, violations of an assaultive nature, or violations by a person with a history of assaultive conduct or by a person with a history of repeated parole failure may warrant a decision above the guidelines. Minor offense(s) (e.g., traffic infractions, disorderly conduct) shall normally be treated under administrative violations.

§ 2.22 Communication with the Commission.

Attorneys, relatives, or interested parties wishing a personal interview to discuss a specific case with a representative of the Commission must submit a written request to the appropriate regional office setting forth the nature of the information to be discussed. Such personal interview may be conducted by Staff Personnel in the regional offices. Personal interviews, however, shall not be held by an examiner or member of the Commission except under the Commission's appeals procedures.

§ 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hearing examiners the authority necessary to conduct hearings and make recommendations relative to the grant or denial of parole or reparole, revocation or reinstatement of parole or mandatory release, and conditions of parole.

(b) Hearing examiners shall function as two-man panels except as provided by §§ 2.43 and 2.47 and the concurrence of two examiners shall be required for their recommendation. In the event of a divided recommendation by the panel, the appropriate regional Administrative hearing Examiner shall cast the deciding vote.

(c) In the event the Administrative Hearing Examiner is serving as a member of a hearing examiner panel or is otherwise unavailable, cases requiring his action under paragraph (b) of this section will be referred to another hearing examiner.

(d) A recommendation of a hearing examiner panel shall become an effective Commission decision upon review at the Regional Office and docketing, unless action is initiated by the regional Commissioner pursuant to § 2.24.

JEROME N. FRANK
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NEW HAVEN, CONNECTICUT 06520
Tel. (203) 436-2210

October 14, 1977

Mr. A. Daniel Fusaro
United States Court of Appeals
United States Courthouse
Foley Square
New York, NY 10007

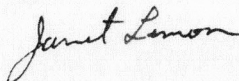
Dear Mr. Fusaro:

Enclosed is the Appellants' brief and ten copies to be filed in RODERICK DUBOIS v. GEORGE C. WILKINSON, #77-2070, and ALAN GENE KINCAIDE and MELVIN E. HENTOFF, #77-2100, consolidated on appeal.

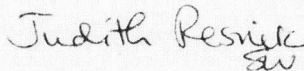
A stipulation to withdraw the appeal of Melvin E. Hentoff will follow.

Thank you for your consideration.

Sincerely,



Janet Lennon
Law Student Intern



Judith Resnik
Supervising Attorney

JL/JR/lp

Enclosures

